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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MAJOR MEDIA OF THE SOUTHEAST, INC., d/b/a NAEGELE OUTDOOR ADVERTISING CO. OF RALEIGH-DURHAM,
Petitioner,

v.

CITY OF RALEIGH,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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MOTION OF OUTDOOR ADVERTISING ASSOCIATION OF AMERICA, INC. FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The Outdoor Advertising Association of America, Inc. (OAAA), by its attorneys, respectfully moves, pursuant to Rule 36.1, for leave to file a brief as amicus curiae supporting the petition for a writ of certiorari of Major Media of the Southeast, Inc. ("Naegele"). While the Petitioner Naegele has consented to the filing of a brief of OAAA as amicus curiae, the Respondent City of Raleigh has refused consent.

In support of this motion, the OAAA states the following:

1. The OAAA is the primary trade association of the standardized outdoor advertising industry. The OAAA's members range in size from small, locally-based businesses to businesses which operate on a regional and national basis. OAAA's members collectively maintain approximately 250,000 outdoor advertising signs. The Petitioner is a member of OAAA.

2. The constitutional issues raised by the Petitioner have an impact far beyond the interests of the Petitioner Naegele and the Respondent City of Raleigh. In particular, the question of whether a governmental body constitutionally can use the fiction of "amortization" to avoid paying just compensation where it requires the destruction of outdoor advertising sign structures materially and substantially affects the property, civil rights and economic livelihoods of all of OAAA's members.

3. Because the OAAA represents the interests of a large and diverse group of outdoor advertising sign owners, its brief provides a perspective on the issues which is different from that of either the Petitioner or of the Respondent. In addition, the brief proffered by OAAA as amicus curiae provides relevant factual information regarding the physical permanence, immobility and fair market value of outdoor advertising sign structures which was not presented to this Court by the Petitioner and which, in all likelihood, the Respondent will not present.

4. OAAA and its counsel are unaware of any legitimate reason for the refusal of the Respondent City of Raleigh to consent to the filing of OAAA's brief

as amicus curiae. OAAA notes, however, that the Respondent also opposed acceptance of a brief of OAAA as amicus curiae, which supported the position of Petitioner Naegele, proffered by OAAA to the United States Court of Appeals for the Fourth Circuit. The Court of Appeals accepted OAAA's brief as amicus curiae despite the opposition of the Respondent.

The desirability of acceptance of the brief of OAAA as amicus curiae in support of the petition for a writ of certiorari having been shown, OAAA respectfully moves this Court for leave to file the attached Brief as Amicus Curiae of the Outdoor Advertising Association of America, Inc. in Support of the Petition for a Writ of Certiorari.

Respectfully submitted,

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BRIEF FOR THE OUTDOOR ADVERTISING ASSOCIATION OF AMERICA, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The Outdoor Advertising Association of America, Inc. (OAAA) is the trade association of the standardized outdoor advertising industry and represents a majority of the outdoor advertising companies in the United States. OAAA members maintain approximately 250,000 outdoor advertising signs in approximately 7,900 distinct local geographical areas throughout the United States. Seven OAAA member-

companies, including the Petitioner, maintain operations within the State of North Carolina. The Association's membership is extremely diverse and includes both large, integrated national media companies and small, locally based family-owned businesses which typically provide services to one or more market areas within a particular state.

The membership of the OAAA has a vital interest in the instant case. The central issue before the Court is whether a municipality may employ its police power to expropriate one hundred seventy-four lawfully erected outdoor advertising signs and destroy an investment valued in excess of $3 million, without payment of just compensation, based on the fiction that a delay in the date of that expropriation (i.e., "amortization") negates that loss. The Court of Appeals' approval of the principle of "amortization" poses an immediate and direct threat to the multi-billion dollar capital investment of the outdoor advertising industry nation-wide. Indeed, the Circuit Court's decision casts a broad shadow of uncertainty over virtually every decision to commit investment capital to the construction or acquisition of any structure on real property.

The Court's disposition of this Petition will have an immediate impact on the continued existence of the outdoor advertising medium in North Carolina. A number of counties and cities within the State of North Carolina already have enacted laws that mirror the "amortization" provisions of the Raleigh ordinance. Several of these ordinances are currently the subject of litigation pending in the North Carolina courts. Municipal ordinances similar to the Raleigh ordinance also are under consideration or have been enacted in every other state within the Fourth Cir-

cuit. The Court's disposition of this Petition will determine directly the validity of all of these ordinances.

The implications of this case are equally decisive for the continued viability of outdoor advertising companies throughout the United States. As in Raleigh, lawfully erected outdoor advertising sign structures are located nationwide with other compatible land uses within commercial and industrial zones. Nevertheless, outdoor advertising is regularly subject to efforts aimed at its suppression. Local ordinances seeking to compel the removal of lawfully erected outdoor advertising structures have been enacted by municipalities in virtually every state.

A legal system which countenances the forced destruction of lawfully erected outdoor advertising sign structures without the payment of just compensation for the resultant loss of millions of dollars of investment destroys the foundation upon which the outdoor advertising industry's financial structure is based. Indeed, the implications of the Fourth Circuit's approval of "amortization" extend well beyond the outdoor advertising industry, since there is no logical basis for distinguishing outdoor advertising sign structures from all other property subject to land use controls. If the Circuit Court's rationale is not rejected, local governments could compel the destruction of property, without the payment of any compensation, just so long as they wait a "reasonable" time before taking the property from its owner.

SUMMARY OF ARGUMENT

Outdoor advertising sign structures are valuable assets which are a principal means of communication of commercial and noncommercial information. Cap-

ital investment in the outdoor advertising industry nationwide is estimated at several billion dollars. Like many other structures, outdoor advertising signs themselves are complex in design, expensive to construct and typically are reduced to the scrap value of their components if removed from the site on which they are erected.

The Raleigh Ordinance would require the destruction of one hundred seventy-four of the Petitioner's outdoor advertising signs without any payment of compensation for the virtually total loss of the substantial capital investment in those sign structures. Raleigh purports to avoid the payment of just compensation for the required destruction of the Petitioner's property by permitting the structures to continue in existence for five and one-half years after passage of the ordinance requiring their destruction. Raleigh's use of such an "amortization" period was held by the courts below to free Raleigh from any obligation to pay the Petitioner just compensation. This so-called "amortization" scheme totally undercuts the Fifth Amendment's requirement that a government pay just compensation when it deprives an owner of virtually all economic benefit from its property.

In approving the Raleigh "amortization" scheme, the Fourth Circuit failed to articulate a clear constitutional basis for its decision. In addition, the Fourth Circuit confused the accounting concept of "amortization" with business reality when it found that "amortization" over a "reasonable" period of time negated the need for additional compensation to an owner deprived of its property by government action. Finally, the Fourth Circuit found that there is no taking

at all when an "amortization" period was sufficient to permit the owner to "recoup" its investment in property slated for destruction pursuant to government requirement.

The degree to which the "amortization" scheme approved by the Fourth Circuit threatens to undercut the constitutional requirement of monetary payment of just compensation when government takes property in and of itself is a substantial reason why this Court should grant this Petition. The need for review by this Court is heightened by the failure of the Fourth Circuit to articulate a clear and reasonable constitutional basis for approval of the Raleigh "amortization" scheme.

ARGUMENT

I. OUTDOOR ADVERTISING IS A MEDIUM OF COMMUNICATION INVOLVING MAJOR CAPITAL INVESTMENT PREDICATED UPON THE CONSTITUTIONAL PROTECTIONS AFFORDED TO PRIVATE PROPERTY

A. Outdoor Advertising Is A Major Medium Of Communication With A Market Value Comparable To Broadcast and Newspaper Properties

Outdoor advertising has been a principal means for the public dissemination of commercial and noncommercial information in the United States since the inception of this country. *See*, Davidson, *Propaganda and the American Revolution* (1941); Gallo, *The Poster in History* (1972); Houch, *Outdoor Advertising: History and Regulations* (1969) ch. 2. The outdoor medium remains a primary channel for communication despite strong competitive pressure from other media.

The reasons outdoor advertising has retained its significance have a direct bearing on this case.

Most of the principal communications media, including television, radio, direct mail, newspapers and magazines, are classified as "in-home" media because they primarily reach their audience in the privacy of the home or workplace. By contrast, outdoor advertising is an "out-of-home" medium because it is predicated on the dissemination of information in a public forum. *Advertising Age*, "Out-of-Home Media Supplement," Mar. 10, 1980. As a result, outdoor advertising quantitatively expands the spectrum of opportunities for the dissemination of information beyond those afforded by the other media.

Outdoor advertising often is used in conjunction with other media to extend the potential for exposure of a particular message. But outdoor advertising often supplants the in-home media because, like every medium, it has certain distinct capabilities and characteristics that make it uniquely suited for certain messages. For example, the fixed print and pictorial copy on a billboard evokes cognition in a different manner than the communication achieved through the broadcast media. The simple declaratory statement "Buckle Your Seat Belts" would command little attention when disseminated by television. But the same message carries substantial impact when it appears alone on a billboard. Likewise, this simple printed statement would not have the same impact when commingled with other copy in a newspaper because of the unique characteristics of that medium. See, Schwartz, *The Responsive Chord* (1974).

As a result of these factors, the market value of outdoor advertising companies, like broadcast prop-

erties and newspapers, far exceeds the book value of their assets. Capital investment in the outdoor advertising industry nationwide is estimated at several billion dollars. Recently the assets of one company operating on a nationwide basis were acquired for $870 million.

B. An Outdoor Advertising Sign Structure Typically Cannot Be Removed Without Destroying Virtually All of Its Value

To the casual observer, it may appear that outdoor advertising sign structures are portable or can be moved with relative ease. In fact, this is not the case. Outdoor advertising sign structures are costly to construct and are based on extremely complex engineering designs which must sustain the enormous stress exerted on a flat sign surface of between 288 and 672 square feet. A standard 14' x 48' structure utilizes the same amount of steel as a substantial 60' x 100' metal building and costs from $20,000 to $60,000 to construct on-site. When complete, the sign structure itself weighs 15 tons and typically is supported by a foundation composed of 40 cubic yards of concrete which is 25 feet deep and weighs an additional 130 tons.

Smaller 12' x 25' poster panel structures weigh three tons and cost between $6,000 and $20,000 to construct on-site. A poster panel structure also is supported by a substantial concrete foundation which varies in design based on the requirements of the site.

Like most other structures, once an outdoor advertising sign structure is erected, it cannot be disassembled without literally tearing the structure apart. The remnants typically only have scrap value.

The Raleigh ordinance would compel the Petitioner, under threat of criminal penalty, to remove one hundred seventy-four such lawfully erected outdoor advertising signs without any compensation for even the capital investment which they represent. Amicus OAAA simply is unable to comprehend as a practical matter how the Petitioner is compensated for its commitment of capital and commensurate investment expectation that supported the construction of those structures through Raleigh's "amortization" scheme. A delayed taking of property is no less a taking of property than governmental action which eliminates such property immediately.

II. THE ISSUE OF WHETHER "AMORTIZATION" SATISFIES THE REQUIREMENTS OF THE TAKING CLAUSE IS CENTRAL TO THE COURT'S CURRENT EVALUATION OF THE FIFTH AMENDMENT

The decision of the United States Court of Appeals for the Fourth Circuit, which is the subject of the Petition, demonstrates that the court below never grasped the constitutional significance of Raleigh's "amortization" scheme. On the one hand, the Fourth Circuit appeared to find that a five and one-half year "amortization" period which permitted the Petitioner to "recoup" at least part of its investment was sufficient compensation for a taking of the Petitioner's sign structures. But the decision of the Fourth Circuit also appeared to find that since the Raleigh ordinance allowed the Petitioner to keep its sign structures for five and one-half years before their required destruction, there was no taking at all. Regardless of which course is followed, the notion that "amortization" is a remedy which either negates a taking or alterna-

tively satisfies the compensation requirement of the Fifth Amendment is central to the evaluation of the Taking Clause presently being undertaken by this Court. If left undisturbed, the Fourth Circuit's endorsement of "amortization" would provide governments with a simple way to evade the requirements of the Fifth Amendment.

A. "Amortization" Is An Accounting Fiction Which Bears No Relationship To Actual Economic Loss Resulting From A Governmental Taking

The Fourth Circuit's approval of Raleigh's "amortization" scheme hinged in part on its conclusion that, since the five and one-half year "amortization" period permitted Petitioner to "recoup" at least a portion of its investment before Raleigh required the destruction of Petitioner's outdoor advertising sign structures, no "additional compensation" was necessary. *Appendix to Petition* at 8a. The fundamental defect in the Fourth Circuit's approval of Raleigh's "amortization" scheme is that it confuses the accounting concept of "amortization" with business reality.

"Amortization" or "depreciation" is nothing more than an accounting fiction used to allocate the cost of an asset over a period of years. However, the widespread acceptance of this notion for accounting purposes does not carry over to circumstances where the actual loss of an asset is involved. No one familiar with accounting would conclude that a capital item still in use which has been fully depreciated on a company's books necessarily has a fair market value of zero. For example, applying conservative accounting principles, the cost of a building may be amortized over 30 years. Yet a building erected in 1956 which still is in use today in all likelihood will have a fair

market value that may actually be higher than its acquisition cost or cost of construction in 1956.

This Court has made it clear on many occasions that where property has been taken, the standard measure of compensation is the fair market value at the time of the taking. *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979), *United States v. Miller*, 317 U.S. 369 (1943), *reh. denied*, 318 U.S. 798 (1943), *City of New York v. Sage*, 239 U.S. 57, 61 (1915). The fact that the owner of property may have held the property for many years, may have recouped its investment many times over, or that the property may have been depreciated to zero simply never enters into the decision of the fair market value. The only relevant issue is the property's fair market value at the time its beneficial use was extinguished by government action. Despite this fact, the Fourth Circuit adopted the perverse view that the Petitioner will be compensated for the taking of all or part of its investment solely through the realization of gross revenues which it would have received in any event. Under this reasoning, government would never have to pay monetary compensation in the event of a taking if it could delay the taking a "reasonable" time.

B. "Amortization" Is A Taking Of Property Without Payment Of Just Compensation

The outdoor advertising sign structures at issue in this case were constructed in commercial and industrial areas in compliance with all land use regulations and the building codes applicable at the time they were erected. Those regulations were predicated on Raleigh's subjective perception at that time that billboards were a compatible use within commercial and industrial zones. In 1983 Raleigh changed that policy

with the enactment of Ordinance No. (1983) 210 TC 198. This is not any different than the circumstances of a manufacturing plant located in an older commercial district that became "gentrified" and subsequently was zoned for residential use. In both instances a once lawful use is declared nonconforming. But OAAA doubts that Raleigh would seriously contend to this Court that it could exercise its police power to require the destruction of that factory building after the expiration of a "grace period" of several years and escape the constitutional requirement to pay just compensation to the building's owner.

The courts below have pushed the distinction between a police power regulation and condemnation too far in this instance. The core premise for a valid exercise of the police power which does not give rise to Fifth Amendment rights is that the owner of the affected property has not been stripped of all economic benefit from its use. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), *United States v. Riverside Bayview Homes, Inc.*, 106 S.Ct. 455, 459 (1985). An ordinance which seeks to substitute ordinary revenue from a capital asset for the payment by the government of compensation simply has not provided the owner with anything of economic value which was not part of the owner's initial expectation. Such an ordinance proposes nothing more than an economic "shell game" in which the owner of property essentially pays himself, rather than receiving payment from the government for the destruction of his property for some ostensible public purpose. Such a scheme conflicts directly with the decisions of this Court which repeatedly have held that the just compensation requirement of the Fifth Amendment in-

cludes the requirement of a payment to the owner of the full monetary equivalent of the property. *United States v. Miller, Almota Farmers Elevator and Warehouse Co. v. United States*, 409 U.S. 470 (1973).

The Raleigh ordinance does not merely diminish the value of the Petitioner's property and permit some reasonable alternative use. It destroys virtually all such value and deprives the owner of all reasonable use. The so-called "amortization" scheme implemented by the Raleigh ordinance completely undercuts the legal and constitutional framework which assures that the commitment of capital investment in property may be made with confidence that the government subsequently will not seize or destroy that property without payment of just compensation.

C. A Taking Occurring After A Period Of Years Still Is A Taking

The Fourth Circuit also concluded that, where an owner is deprived of property by the government over a period of years sufficient for the owner to "recoup" his or her investment, there is no taking at all. *Appendix to Petition* at 9a-10a.

Under the Fourth Circuit's analysis, if a government condemns property, but permits the owner of the property to continue to use it for a "reasonable" period of years until the government takes actual possession, the government need not pay the owner because there has been no taking. There clearly is no constitutional basis for the concept that a delayed taking of private property somehow ceases to be a taking. Indeed, there are many inverse condemnation cases where governmental actions occurring over a

period of years have been found cumulatively to be a taking necessitating the payment of just compensation. *United States v. Causby*, 328 U.S. 256 (1946), *Foster v. United States*, 607 F.2d 943 (Ct. Cl. 1979), *Wilfong v. United States*, 480 F.2d 1326 (Ct. Cl. 1973), *Pete v. United States*, 531 F.2d 1018 (Ct. Cl. 1976).

III. CONCLUSION

There are four cases pending before this Court this term which raise a spectrum of issues regarding the extent to which an exercise of the police power impinges upon rights guaranteed under the Fifth Amendment Taking Clause. Given this circumstance, the reasons for granting the instant petition for a writ of certiorari are particularly compelling. The instant case provides perhaps the clearest factual context of governmental action under the guise of the police power which results in the virtually complete destruction of private property. Moreover, a decision in any of these pending cases that a compensable taking may occur as a result of an exercise of police power would not be meaningful if this Court did not, at the same time, resolve the current conflict in the federal and state courts regarding whether governments may evade the constitutional consequences of a taking simply by affording the owner of the property involved an extension of time before that property is finally expropriated. Given the significance of the issues presented in the instant case, at a minimum the Court should hold the Petition for disposition until after decisions are rendered in the pending cases.

Respectfully submitted,

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